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Sep 9 1988		Brief of respondent Illinois in opposition filed.
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Oct 11 1988		Dissenting opinion by Justice Marshall with whom Justice Brennan joins. [Detached opinion.]

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988 ____

DONALD R. LEGO, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

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No._____

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the retroactivity standard announced in Griffith v. Kentucky, 479 U.S. ___, 93 L.Ed.2d 649 (1987), which abolished the "clear break" exception to retroactive application of new constitutional rules to cases pending on direct review, is binding on the Illinois Supreme Court, and required that court to retroactively apply its ruling in People v. Zehr, 103 Ill.2d 472, 409 N.E.2d 1362 (1984) to Petitioner's direct appeal, and hold that the refusal to question prospective jurors on the presumption of innocence deprived Petitioner of his constitutional right to an impartial jury.

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DONALD R. LEGO, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

The petitioner, DONALD R. LEGO, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois which held that Mr. Lego was properly convicted of the offense of murder and sentenced to death.

OPINION BELOW

The opinion of the Supreme Court of Illinois appears at 116 Ill.2d 323, 507 N.E.2d 800 (1987). A copy of the opinion is attached to this petition as Appendix A.

The orders of that court denying a petition for rehearing are not reported. Copies of those order are attached as Appendices B, C and D.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on February 20, 1987. (Appendix A) A petition for rehearing was denied on June 5, 1987. (Appendix B) The order denying rehearing was, however, vacated on August 6, 1987. (Appendix C) Rehearing

was finally denied on June 27, 1988 (Appendix D). This petition is being filed within sixty days of the Illinois Supreme Court's final denial of rehearing. The jurisdiction of the Court is invoked under 28 U.S.C. sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Clause 2 of the Constitution of the United States (the Supremacy Clause) provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall...deprive any person of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

Petitioner Donald R. Lego was convicted by jury of the murder of Mary Mae Johnson during the commission of a burglary and armed robbery. At the request of the State, a death penalty hearing was held. The jury unanimously found the existence of a statutory aggravating factor and found that there were no mitigating factors sufficient to preclude a sentence of death. The trial court sentenced Petitioner to death.

Prior to trial, the Petitioner, who represented himself pro - se (with appointed "stand-by" counsel in the courtroom) submitted six questions which he requested the trial court to propound to prospective jurors during voir dire. Included among those questions was whether the jurors "believe(d) in a presumption of innocence as it applied to a person charged with a crime." (Report of Proceedings at 1094-95). The trial court refused to submit the question, explaining:

> As far as the presumption of innocence is concerned, in my initial charge to a jury, I advise them there is a presumption of innocence that remains with the Defendant throughout the case and during the deliberations of the jury on its verdict, and it is not overcome unless they believe from the evidence, beyond a reasonable doubt,that the Defendant is guilty, and having told them that and having told them their obligation to follow the law as I state it to be, and that would include a statement by the Court and the instruction that there is such a presumption of innocence, that it governs the deliberations in the case. I don't see any need to query each individual juror on the point. (Report of Proceedings at 1099-1100).

In his direct appeal to the Illinois Supreme Court, the Petitioner argued that the trial court's refusal to specifically inquire into each prospective juror's views on the presumption of innocence had deprived him of the right to a fair and impartial jury. In support of this contention, Petitioner relied upon People v. Zehr, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984), a decision rendered subsequent to Petitioner's trial, in which the Illinois Supreme Court had held that the refusal to question prospective jurors on their views of the presumption of innocence deprived criminal defendants of their right to a fair and impartial jury. 469 N.E.2d at 1064.

In Petitioner's appeal, however, the Illinois Supreme Court rejected the claim of error. Noting that its decision in People v. Zehr was rendered after Petitioner's trial, the court refused to apply Zehr retroactively to Petitioner's case as "the holding in Zehr represented a change in Illinois law." People v. Lego, 116 Ill.2d 323, 507 N.E.2d 800, 805 (1987).

In dissent, Illinois Supreme Court Justice Simon expressed the view that under this Court's opinion in Griffith v. Kentucky, 479 U.S. ___, 93 L.Ed.2d 649 (1987), the Illinois Supreme Court was obliged to apply its decision in People v. Zehr retroactively to Petitioner's case. Justice Simon observed that in Griffith, this Court had reexamined its retroactivity jurisprudence and concluded that new constitutional principles should be applied retroactively to cases pending on direct review, even when such a principle constitutes a "clear break" from prior law. People v.

Lego, 116 Ill.2d 323, 507 N.E.2d 800, 813 (1987) (Simon, J., dissenting).

Petitioner sought rehearing in which he urged the Illinois Supreme Court, in light of Griffith v. Kentucky, 479 U.S. ___, 93 L.Ed.2d 649 (1987), to reconsider its refusal to apply the new constitutional rule announced in People v. Zehr retroactively to his direct appeal. Rehearing, however, was denied.

REASON FOR GRANTING CERTIORARI

CERTIORARI SHOULD BE GRANTED TO RESOLVE A SIGNIFICANT CONSTITUTIONAL ISSUE NOT PREVIOUSLY ADDRESSED BY THIS COURT AND UPON WHICH STATE COURTS ARE IN DISAGREEMENT; THAT IS, WHETHER A STATE COURT, WHICH RENDERS A DECISION ESTABLISHING A NEW FEDERAL CONSTITUTIONAL RULE ON AN ISSUE NOT SPECIFICALLY ADDRESSED BY ANY PRIOR DECISIONS OF THIS COURT, IS BOUND TO APPLY THIS COURT'S RETROACTIVITY STANDARDS IN DETERMINING THE RETROACTIVITY OF THAT NEW RULE

Since Linkletter v. Walker, 381 U.S. 618 (1965), this Court's announcement of a new constitutional rule governing criminal procedure has frequently been followed by a separate decision explaining whether, and to what extent, that rule will be applied retroactively. See generally Beytagh, Ten Years of Non-Retroactivity: A Critique and a Proposal, 61 Va.L. Rev. 1557 (1975). Prior to Linkletter, both the common law and the holdings of this Court had required that all constitutional decisions receive full retroactive application. In Linkletter, however, this Court concluded "that the Constitution neither prohibits nor requires [that] retrospective effect" be given to any new constitutional rule, and that a determination of retroactivity must depend upon "weigh[ing] the merits and demerits of each case." 381 U.S. at 629. The factors to be weighed in each case included "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Stovall v. Denno, 388 U.S. 293, 297 (1967). For purposes of applying these three factors, no distinction was made between convictions that

were final and those that were pending at various stages of trial and direct review. Stovall, 388 U.S. at 300.

In United States v. Johnson, 457 U.S. 537 (1982), however, this Court concluded that the retroactivity analysis for convictions that had become final must be different from the analysis for convictions that were not final at the time the new decision was announced. In Johnson, and later in Shea v. Louisiana, 470 U.S. 51 (1985), this Court held that a decision establishing a new constitutional rule was to be applied retroactively to all convictions that were not yet final at the time the decision was rendered, except where the new rule constituted a "clear break" with past precedent. Johnson, 457 U.S. at 549-550; Shea, 470 U.S. at 59.

In Shea, this Court expressed some doubt about the merits of the "clear break" exception to retroactivity, but did not reach the issue. Two years later, however, in Griffith v. Kentucky, 479 U.S. ___, 93 L.Ed.2d 649 (1987), this Court concluded that maintenance of the "clear break" exception, which had resulted in the failure in some cases to apply a newly declared constitutional rule to all cases pending on direct review, "violates basic norms of constitutional adjudication". 93 L.Ed.2d at 658. The Court in Griffith therefore held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past". 93 L.Ed.2d at 661.

It is well established that when this Court renders a decision announcing a new constitutional rule, the scope of retroactivity to be accorded that decision by state courts is controlled by the retroactivity principles established by this Court. See Griffith v. Kentucky, 479 U.S. ___, 93 L.Ed.2d 649, 658 (1987); Daniels v. Louisiana, 420 U.S. 31, 32 (1975); Tehan v. United States ex rel. Shott, 382 U.S. 406, 409 n.3 (1966). This Court, however, is not the only court to rule on federal constitutional issues. Under the Supremacy Clause, state courts share equally in that responsibility. United States Const., Art. VI, Cl.2; Stone v. Powell, 428 U.S. 465, 493 (1976); Public Service Commission of Utah v. Wycoff, 344 U.S. 237, 247-248 (1952). As a result, it is a relatively common occurrence for a state court to render a decision announcing a new federal constitutional rule to govern criminal trial procedures in that state. And, like this Court, that state court must later determine the scope of retroactivity to be accorded that new federal constitutional rule.

This Court has never addressed the question of what principles control the retroactivity of state court decisions which announce new federal constitutional rules. If a state supreme court renders a decision which establishes a new federal constitutional rule on an issue not specifically addressed by any prior decision of this Court, is that state court bound by the retroactivity principles established by this Court for constitutional cases, or is that state court free to establish its own retroactivity standards?

Because many state courts simply apply this Court's established principles to their own retroactivity cases without discussing whether they are bound to do so, there is not an abundance of authority on the issue. Those state courts which have addressed the issue, however, are in sharp disagreement. Compare State v. O'Coin, 417 A.2d 310 (R.I. 1980) and State v. Raskin, 30 Wis. 2d 39, 139 N.W.2d 667 (1966) with Commonwealth v. McFeely, 509 Pa. 394, 502 A.2d 167 (1985) and Waits v. People, 724 P.2d 1329 (Colo. 1983).

In State v. O'Coin, 417 A.2d 310 (R.I. 1980) the Rhode Island Supreme Court determined the retroactivity of its earlier decision in State v. Jenison, 122 R.I. 142, 405 A.2d 3 (1979), holding that the exclusion of members of the university academic community from grand jury service violated the due process clause of the Fourteenth Amendment. In making this determination, the court recognized that "the retroactivity of Jenison, a decision based on federal constitutional law, must be determined in compliance with federal law governing retroactivity." 417 A.2d at 312.

Similarly, in State v. Raskin, 30 Wis. 2d 39, 139 N.W.2d 667 (1966), the Wisconsin Supreme Court faced the issue of the retroactivity to be accorded State ex rel White v. Simpson, 28 Wis. 2d 590, 137 N.W.2d 391 (1965), in which it had held that issuance of an arrest warrant by a local prosecutor violated the Fourth Amendment. The Raskin court noted that in determining the retroactivity of White, which was concerned with federal

constitutional guarantees, it was "bound by the decisions thereon by the United States Supreme Court." 139 N.W.2d at 673.

In contrast, the Pennsylvania Supreme Court in Commonwealth v. McFeely, 509 Pa. 394, 502 A.2d 167 (1985), faced with deciding the retroactivity of Commonwealth v. Williams, 483 Pa. 293, 396 A.2d 1177 (1978), in which it had held that a warrantless arrest made in the arrestee's home, absent exigent circumstances, violated the Fourth Amendment, stated that it was "not bound" by this Court's retroactivity standards. 502 A.2d at 169. Therefore, although this Court had earlier decided in United States v. Johnson, 457 U.S. 537 (1982), that Fourth Amendment issues were retroactive to cases pending on direct review, the Pennsylvania Supreme court in McFeely, "decline(d) to adopt the view" of this Court in Johnson and instead applied the three-factor balancing test of Stovall v. Denno, 388 U.S. 293 (1967), which this Court had explicitly abandoned in Johnson. McFeely, 502 A.2d at 169-170.

Similarly, the Colorado Supreme Court has made clear that it does not feel bound by this Court's retroactivity cases. In Waits v. People, 724 P.2d 1329 (Colo. 1986), the court faced the issue of the retroactivity of People v. Thomas, 660 P.2d 1272 (Colo. 1983), in which it had held that an investigatory stop of an automobile based solely on evasive maneuvers to avoid police contact violated the Fourth Amendment. The Colorado Supreme Court in Waits stated that while it had "followed the lead" of this Court in determining the retroactivity of a new rule of criminal procedure, "on Fourth Amendment questions we have not

chosen between the retroactivity analysis set forth in Stovall v. Denno, 388 U.S. 293 (1967), and the 'bright line' approach announced later in United States v. Johnson, 457 U.S. 537 (1982)." Waits, 724 P.2d at 1335 (emphasis added).

The case at bar presents this Court with the opportunity to resolve this conflict among state courts of last resort on the question of whether those courts, in rendering decisions which establish new federal constitutional rules on issues not specifically addressed by any prior decision of this Court, are nevertheless bound to follow this Court's retroactivity standards in determining the retroactivity of those new rules.

A criminal defendant in a state court proceeding is guaranteed an impartial jury by the Sixth Amendment as applied to the states through the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145 (1968). In People v. Zehr, 103 Ill.2d 472, 469 N.E.2d 1062 (1984), the Illinois Supreme Court held that it was essential to the selection of an impartial jury that prospective jurors be questioned during voir dire on their views of the presumption of innocence accorded criminal defendants.

This Court has never specifically addressed the issue decided in Zehr. In Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981), this Court did recognize, however, that "(v)oir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." This Court has also recognized that while trial courts have broad discretion over the questions to be put to prospective jurors during voir dire [Smith v. United States, 431 U.S. 291,

308 (1977); Aldridge v. United States, 283 U.S. 308, 310 (1931)], there are, nevertheless, certain subject matters which must be addressed in voir dire to meet constitutional requirements. See Ristiano v. Ross, 424 U.S. 589 (1970)(prospective jurors must be questioned on racial bias where the facts of a particular case indicate that such bias is likely to affect the jurors); Turner v. Murray, 476 U.S. ___, 90 L.Ed.2d 27 (1986) (prospective jurors must be questioned on racial bias in a capital case involving an interracial crime)*

The Petitioner here requested that the trial court in his case question prospective jurors during voir dire on their belief in the presumption of innocence accorded to criminal defendants. The trial court refused to do so. In his direct appeal to the Illinois Supreme Court, relying on People v. Zehr, 103 Ill.2d

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*Whether prospective jurors must be questioned on their view of the presumption of innocence has been addressed by a number of state and federal courts, which have reached conflicting conclusions. Compare United States v. Hill, 738 F.2d 152 (6th Cir. 1984); State v. Cere, 125 N.H. 421, 480 A.2d 195 (1984); People v. Zehr, 103 Ill.2d 472, 469 N.E.2d 1062 (1984); Jones v. State, 378 So. 2d 797 (Fla. App. 1979) (holding that jurors must be questioned on the presumption of innocence) with United States v. Gillette, 383 F.2d 843 (2nd Cir. 1967); United States v. Wooten, 518 F.2d 943 (3rd Cir. 1975), cert. denied, 423 U.S. 895 (1975); United States v. Robinson, 804 F.2d 280 (4th Cir. 1986); United States v. Ledee, 549 F.2d 990 (5th Cir. 1977), cert. denied 434 U.S. 902 (1977); United States v. Price, 577 F.2d 1356 (9th Cir. 1978), cert denied, 439 U.S. 1068 (1979); Grandsinger v. United States, 332 F.2d 80 (10th Cir. 1964); United States v. Miller, 758 F.2d 570 (11th Cir. 1985), cert denied ___ U.S. ___, 88 L.Ed.2d 357 (1985); State v. Dahlgren, 200 Conn. 586, 512 A.2d 906 (1986); Commonwealth v. Rhodes, 379 Mass. 810, 401 N.E.2d 342 (1980); Commonwealth v. Kingsley, 480 Pa. 560, 391 A.2d 1027 (1978) (holding that there is no requirement that jurors be questioned on the presumption of innocence).

472, 469 N.E.2d 1062 (1984), Petitioner claimed that this refusal violated his constitutional right to an impartial jury. The Illinois Supreme Court however, over the dissent of Justice Simon, held that its decision in Zehr would not be applied retroactively to Petitioner's case because Zehr "represented a change in Illinois law." People v. Lego, 116 Ill.2d 323, 507 N.E.2d 800, 805 (1987). In dissent, Justice Simon recognized that the opinion of the Illinois Supreme Court in Petitioner's case was in conflict with this Court's decision in Griffith v. Kentucky, 479 U.S. ___, 93 L.Ed2d 649 (1987), which held that a new constitutional rule for the conduct of criminal prosecutions is to be applied retroactively to all cases pending on direct review, with no exception for cases in which the new rule constitutes a "clear break" from prior law. People v. Lego, 116 Ill.2d 323, 507 N.E.2d 800, 813 (1987). (Simon, J., dissenting).

As Justice Simon found below, the Illinois Supreme Court erred in failing to apply the retroactivity standard announced in Griffith v. Kentucky to Petitioner's case. Under the Supremacy Clause (United States Constitution, Art. VI, Cl. 2) decisions of this Court on matters of federal constitutional law are binding on state courts. Sims v. Georgia, 385 U.S.538, 543-544 (1967); South Carolina v. Bailey, 289 U.S. 412, 420 (1932).

It is true that "the Constitution neither prohibits nor requires [that] retrospective effect" be given to any "new" constitutional rule. United States v. Johnson, 457 U.S. 537, 542 (1982), citing Linkletter v. Walker, 381 U.S. 618, 629 (1965). It is also true, however, that the Constitution neither prohibits

nor requires the exclusion of illegally seized evidence. See United States v. Leon, 468 U.S. 897, 906 (1984). The exclusionary rule is simply "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the person aggrieved." United States v. Calandra, 414 U.S. 338, 348 (1974). Nevertheless, the circumstances under which the federal exclusionary rule must be applied by state courts are defined by the decisions of this court, which are binding on state courts. See Mapp v. Ohio, 367 U.S. 643, 655 (1961).

Similarly, there is nothing in the Constitution which mandates a particular standard for determining the validity of a waiver of constitutional rights or for adjudging when a constitutional violation may constitute harmless error. Nevertheless, states courts are bound by the standards set by this Court on matters of waiver of federal constitutional rights and the harmlessness of federal constitutional errors. See Brookhart v. Janis, 384 U.S. 1, 4 (1966); Chapman v. California, 386 U.S. 18, 20-21 (1967).

Like issues regarding the exclusion of illegally seized evidence, the waiver of constitutional rights, and the harmlessness of constitutional error, issues regarding the retroactivity of new federal constitutional rules involve "basis norms of constitutioral adjudication." Griffith v. Kentucky, 479 U.S. ___, 93 L.Ed.2d 649, 658 (1987). Those constitutional norms should be established by this Court, and, under the Supremacy Clause, be held to be binding on the state courts.

This Court should grant certiorari in this case, reverse the judgment of the Illinois Supreme Court, and hold that a state court which renders a decision establishing a new federal constitutional rule is bound to apply this Court's retroactivity standards in determining the scope of retroactivity of that new rule.

CONCLUSION

For the foregoing reasons, Donald R. Lego, Petitioner, respectfully asks that a writ of certiorari be issued to the Supreme Court of Illinois.

Respectfully submitted,

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116 Ill.2d 323

The PEOPLE of the State of Illinois, Appellee,

v.

Donald R. LEGO, Appellant.

No. 59966.

Supreme Court of Illinois.

Feb. 20, 1987.

Rehearing Denied June 5, 1987.

Defendant was convicted of murder, of burglary with intent to commit murder, of burglary with intent to commit theft, and of armed robbery by the Circuit Court, Will County, Michael A. Orenic, J., and he appealed. The Supreme Court, Goldenhersh, J., held that: (1) denial of defendant's motion for change of venue based on extensive pretrial publicity did not deprive him of fair and impartial jury, though three jurors admitted on voir dire to having heard about case through media; (2) verbatim statements of witnesses obtained by defendant's investigators did not fall in scope of protection afforded by work-product rule; (3) failure to hold bifurcated sentencing hearing was not prejudicially erroneous; (4) prosecutor's remarks at sentencing hearing, that death sentence alone would be consistent with jurors' dignity and their personal commitment to law, were not so highly prejudicial as to require new sentencing hearing; and (5) Illinois Pattern Jury Instruction given at sentencing hearing, that juror should not allow either sympathy or prejudice to influence them, did not preclude jurors from considering any relevant mitigating factors in violation of defendant's Eighth and Fourteenth Amendment rights.

Affirmed in part and vacated in part.

Simon, J., dissented and filed opinion.

1. Criminal Law ⇐1126(1)

Denial of defendant's motion for change of venue based on extensive pretrial publicity did not deprive him of trial by fair and impartial jury, though three jurors admitted during voir dire to having heard of case through media, where defendant did not challenge jurors, jurors indicated that they could render impartial verdict based on law and evidence, and trial court repeatedly admonished jurors to avoid media coverage of trial and to avoid discussing case among themselves or with others.

2. Criminal Law ⇐1149
Indictment and Information ⇐121.1(3)

Whether state should be required to furnish defendant with bill of particulars is matter committed to sound discretion of trial court, and trial court's decision will be reversed only for clear abuse of discretion.

3. Indictment and Information ⇐121.1(1)

Purpose of bill of particulars is to adequately inform defendant of nature of accusation against him.

4. Indictment and Information ⇐121.2(1)

Denial of defendant's motion for bill of particulars alleging time, date, and instrument used in crime was not abuse of discretion, where defendant failed to explain how denial of motion impeded preparation of defense.

5. Witnesses ⇐8

Pretrial subpoena should not be used as discovery tool.

6. Courts ⇐100(1)

State Supreme Court case, holding that trial court must allow defendant to question prospective jurors about whether they accept presumption of innocence, would not be applied retroactively.

7. Witnesses ⇐306

Constitutional privilege against self-incrimination was personal to defendant and did not extend to statements of third party witnesses taken by defendant's investigators. U.S.C.A. Const.Amend. 5.

8. Criminal Law ⇐627.5(6)

Verbatim statements of witnesses obtained by defendant's investigators did not fall within scope of work-product rule.

9. Constitutional Law ⇐266(3.3)

Defendant was not denied due process rights by suggestive identification proce-

22. Homicide ⇐351

Death penalty statute provided adequate guidelines to distinguish those persons convicted of murder and eligible for death under Criminal Code from those persons convicted of murder and eligible for sentencing under Unified Code of Corrections. S.H.A. ch. 38, ¶¶ 9–1(b) et seq., 1005–1–1 et seq.

Neil F. Hartigan, Atty. Gen., Roma J. Stewart, Sol. Gen., Mark L. Rotert, Asst. Atty. Gen., Jack Donatelli, Asst. Atty. Gen., Chicago, for appellee.

Charles M. Schiedel, Deputy State Appellate Defender, Springfield, Lawrence J. Easig, Asst. Defender, Robert E. Davison, First Asst. State Appellate Defender, for appellant.

Justice GOLDENHERSH delivered the opinion of the court:

In a four-count indictment returned in the circuit court of Will County, defendant, Donald Richard Lego, was charged with the murder of Mary Mae Johnson by stabbing and besting her (Ill.Rev.Stat.1981, ch. 38, par. 9–1(a)(1)), and while committing the forcible felonies of burglary with intent to commit murder (Ill.Rev.Stat.1981, ch. 38, par. 9–1(a)(3)), burglary with intent to commit theft (Ill.Rev.Stat.1981, ch. 38, par. 9–1(a)(3)), and armed robbery (Ill.Rev.Stat. 1981, ch. 38, par. 9–1(a)(3)). Following a jury trial, verdicts were returned finding defendant guilty on all counts. Pursuant to section 9–1 of the Criminal Code of 1961 (Ill.Rev.Stat.1983, ch. 38, par. 9–1), at the request of the People, a death penalty hearing was held before the same jury. The jury unanimously found the existence of an aggravating factor set forth in section 9–1(b) (Ill.Rev.Stat.1981, ch. 38, par. 9–1(b)), and found that there were no mitigating factors sufficient to preclude a sentence of death. Defendant was sentenced to death on all four counts of murder. The sentence was stayed (87 Ill.2d R. 609(a)) pending appeal to this court (Ill. Const.1970, art. VI, sec. 4(b); 87 Ill.2d R. 603).

On August 25, 1983, Mary Mae Johnson, an 82-year-old widow, was found dead in her home in Joliet. She had been stabbed repeatedly and bludgeoned. A basement window and window well had been broken. Recovered at the victim's home were a white shirt similar to the one worn by defendant in a photograph taken earlier on the morning of the murder; a hand-rolled cigarette, cigarette filter, and a cigarette butt which, a forensic serologist stated, "evidenced" an O-type secreter, the same type as defendant; an envelope bearing defendant's name and address and containing photographs of defendant's family. A forensic scientist testified that fingerprints found on the door knob, the photographs in the envelope, and on the hand-rolled cigarette, compared to defendant's. The victim's son testified that money which she kept in a bag in her upstairs closet was missing. There was testimony at trial that defendant had done roofing work for Mrs. Johnson some three or four years earlier, for which she paid him $2,000 to $5,000 in cash.

[1] Defendant contends first that the circuit court's denial of his motion to change venue based on extensive adverse pretrial media coverage deprived him of a trial by a fair and impartial jury. He contends that because three of the jurors admitted during *voir dire* to having heard about the case through the media, and because the trial court failed to mitigate the effects of this potentially prejudicial publicity, he did not receive a trial by an impartial jury free from outside influences. (*Nebraska Press Association v. Stuart* (1976), 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683; *Irvin v. Dowd* (1961), 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751.) Citing *People v. Taylor* (1984), 101 Ill.2d 377, 78 Ill.Dec. 359, 462 N.E.2d 478, defendant argues, too, that the jurors' assertions that they had formed no opinion as to the guilt or innocence of defendant are not controlling and that the evidence of the "peculiar nature" of the publicized material showed that it was inherently prejudicial to defendant's case.

The People respond that defendant has not pinpointed a single specific instance of

enunciated in *Speck* and *Gacy*, we conclude that, although the crime was of a sensational nature and the publicity extensive, defendant received a trial from a fair and impartial jury. Our conclusion that the jury was not prejudiced finds further support, in that the record shows that the circuit court repeatedly admonished the jurors to avoid media coverage of the trial and to avoid discussing the case among themselves or with others.

We have considered defendant's contentions in the light of the additional authorities filed after leave given to supplement his brief. We have examined *Coleman v. Kemp* (11th Cir.1985), 778 F.2d 1487, and find it clearly distinguishable. In *Coleman*, the conviction arose out of an occurrence in which five members of a farm family were murdered and another raped and murdered. More than 40 pages of the reported opinion are devoted to describing the comments, primarily newspaper articles, disseminated over a period of months. The court, citing *Rideau v. Louisiana* (1963), 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663, held that the plaintiff had adduced evidence sufficient to meet "the extremely high standard necessary for a successful claim of presumed prejudice." (*Coleman v. Kemp* (11th Cir.1985), 778 F.2d 1487, 1543.) The evidence here falls far short of meeting the "extremely high standard."

We consider next defendant's contention that the circuit court's denial of his motion for a bill of particulars and of his request for the issuance of subpoenas precluded his adequately preparing his defense, thus violating his rights under the sixth and fourteenth amendments of the United States Constitution. In his motion for a bill of particulars, defendant requested information regarding the date and time of the offense and the instrument used to commit the crime.

[2-4] We agree with the People that the resolution of the question whether the People should be required to furnish defendant a bill of particulars is within the sound discretion of the circuit court. (*People v. Curtis* (1968), 41 Ill.2d 147, 148, 242 N.E.2d 201.) Only where there has been a clear abuse of discretion will the denial of a motion for a bill of particulars be held to be error. (*People v. Trukas* (1950), 406 Ill. 613, 617, 94 N.E.2d 895.) The purpose of a bill of particulars is to adequately inform the defendant of the nature of the accusation against him. (*People v. Curtis* (1968), 41 Ill.2d 147, 148, 242 N.E.2d 201.) "[W]here an indictment sufficiently informs the defendant of the offense charged against him there is no need for a bill of particulars * * *." (*People v. Trukas* (1950), 406 Ill. 613, 616-17, 94 N.E.2d 895.) We hold that the indictment sufficiently informed defendant of the offense with which he was charged; and denial of the motion for a bill of particulars alleging the time, date, and instrument used in the crime was not error. We note that defendant has failed to explain in what manner the denial of the motion impeded his preparation of his defense.

[5] Defendant also contends he was precluded from adequately preparing his defense because the circuit court quashed 89 pretrial subpoenas. Among those subpoenaed were 25% of the personnel of the Will County sheriff's office, a person identified only by the name "Charles," and unnamed members of the Chicago press. Defendant has not stated in what manner the quashing of the subpoenas impeded the preparation of his defense, and the apparent indiscriminate choice of persons to subpoena would support the conclusion that defendant was attempting to use subpoena service as a discovery tool. The use of subpoenas to ensure the attendance of witnesses is an important part of our system of jurisprudence, but it exists constitutionally and statutorily independent of our discovery rules. Defendant has failed to show that the witnesses desired were material to his defense, and their testimonies relevant. (*People v. Robinson* (1961), 22 Ill.2d 162, 170, 174 N.E.2d 820, *cert. denied* (1961), 368 U.S. 857, 82 S.Ct. 97, 7 L.Ed.2d 55.) Appropriate discovery procedures were available to defendant, and we hold that the circuit court did not err in quashing the subpoenas.

here. Do you recognize this gentleman here?

THE WITNESS: Yes, I do, now.

MR. LECHWAR: Q. Do you know who that is?

A. Yes.

Q. Would you state for the record what this gentleman's name is?

A. Donald Lego."

The authorities cited by defendant for the proposition that unnecessarily suggestive and conducive identification procedures lead to irreparable mistaken identification and denial of due process are inapplicable because they involve allegedly suggestive pretrial identification procedures and their possible taint upon later in-court identification. (*People v. McTush* (1980), 81 Ill.2d 513, 43 Ill.Dec. 728, 410 N.E.2d 861; *People v. Lee* (1973), 54 Ill.2d 111, 295 N.E.2d 449; *People v. Blumenshine* (1969), 42 Ill.2d 508, 250 N.E.2d 152.) In *People v. King* (1973), 54 Ill.2d 291, 296 N.E.2d 731, an in-court identification of the defendant, at least as suggestive as the foregoing, was held admissible. (54 Ill.2d 291, 299, 296 N.E.2d 731.) The court, holding that the defendant's due process rights were not violated because the jury had the opportunity to weigh the credibility of the witness' testimony, said:

> "The identification by the witness Lookanoff was indeed the result of suggestive questioning, but the entire process, suggestive questions and all, took place in the presence of the jurors, who were in a position to determine the weight to be given to the fact that the defendant was wearing glasses in the courtroom, the difficulty of the witness with the English language, and all other attendant circumstances. We do not agree that the identification was inadmissible." (54 Ill.2d 291, 299, 296 N.E.2d 731.)

The circuit court did not err in admitting Spencer's testimony.

[10] Defendant contends next that, in denying his motion for a mistrial or alternatively to exclude certain evidence, the circuit court denied him due process and violated his right of confrontation guaranteed under the sixth amendment to the United States Constitution. The record shows that the circuit court allowed defendant's pretrial discovery motion which requested, *inter alia*, the substance of any scientific tests or comparisons of the physical evidence obtained by the People. The People produced for defendant copies of three reports prepared by David Metzger, an employee of the crime laboratory of the Illinois Department of Law Enforcement. Metzger had examined certain objects found at the scene, including a shirt. He testified that the shirt was similar to one worn by defendant in a photograph taken the day of the murder. He testified, *inter alia*, concerning certain measurements made of the shirt. The reports, although describing other tests conducted, contained no mention of such measurements. Defendant argues that the incomplete response to discovery prejudiced his case and that the court erred in not granting his motion.

We are not here presented with a knowing failure on the part of the People to produce information which defendant was entitled to obtain on discovery. The record demonstrates that defendant received the verbatim reports which contained no mention of the measurements, and defendant does not contend that there were other reports. Assuming, *arguendo*, that the failure to furnish the information in some manner resulted in error, we hold it to be harmless. The jury saw the shirt and the photograph and heard the testimony of a witness who said the shirt was defendant's. The measurements added little to Metzger's testimony, and defendant does not point out in what manner the evidence was prejudicial. The evidence was not essential to support defendant's conviction, and absent a showing of prejudice, the error, if any, does not require reversal. *People v. Greer* (1980), 79 Ill.2d 103, 37 Ill.Dec. 313, 402 N.E.2d 203.

Defendant contends next that the People engaged in improper closing argument so inflammatory and prejudicial as to require reversal. Although we could hold that defendant's failure to object during the argu-

from the same physical act, he could be convicted of only one murder. (*People v. Szabo* (1988), 94 Ill.2d 327, 350, 68 Ill.Dec. 935, 447 N.E.2d 193; *People v. King* (1977), 66 Ill.2d 551, 566, 6 Ill.Dec. 891, 363 N.E.2d 838, *cert. denied* (1977), 434 U.S. 894, 98 S.Ct. 273, 54 L.Ed.2d 181.) We agree. When multiple convictions are obtained for offenses arising out of a single act, sentence may be imposed only for the most serious offense. (*People v. Mack* (1984), 105 Ill.2d 108, 127, 85 Ill.Dec. 281, 473 N.E.2d 880; *People v. Donaldson* (1982), 91 Ill.2d 164, 170, 61 Ill.Dec. 780, 435 N.E.2d 477.) In *Mack*, we found that, because it involves a more culpable mental state, intentional murder is a more serious crime than felony murder, and that therefore, upon affirmance of defendant's conviction for intentional murder, the other convictions had to be vacated.

[14] We do not agree with defendant that because the jury was allowed to consider the three felony-murder convictions he was denied a fair sentencing hearing. The fact that defendant could be sentenced to only one death penalty does not alter his conduct in the commission of the offense, and we fail to see how it could be prejudicial for the jury which found him guilty to know of the verdicts. In *Mack*, we rejected the contention that defendant was denied a fair sentencing hearing and affirmed the death sentence imposed. (*People v. Mack* (1984), 105 Ill.2d 108, 137, 85 Ill.Dec. 281, 473 N.E.2d 880.) We adhere to that holding here.

Defendant contends next that his death sentence must be vacated because the jury was erroneously permitted to consider as two aggravating factors the findings that defendant killed the victim in the course of committing other felonies, whereas as a matter of law there was only one such aggravating factor. The jury returned separate verdicts finding in one that the murder was committed while committing the offense of burglary with intent to commit theft and in the other while committing armed robbery. Defendant contends that, as the result of considering these as multiple statutory factors, the sentence of death was arbitrarily and capriciously imposed. Citing *People v. Brownell* (1980), 79 Ill.2d 508, 38 Ill.Dec. 757, 404 N.E.2d 181, he argues that, regardless of the verdicts, his conduct constituted only one aggravating factor. *Brownell* is clearly distinguishable. In *Brownell*, the defendant was convicted of intentional murder, aggravated kidnaping and rape. When imposing the death penalty, the circuit court found as an aggravating factor that the murder victim was killed because she was an eyewitness against the defendant. (79 Ill.2d 508, 514, 38 Ill.Dec. 757, 404 N.E.2d 181.) Despite the fact that the court upheld the finding that the murder was committed while committing the felonies of aggravated kidnaping and rape, the court vacated the defendant's sentence and remanded for a new sentencing hearing, holding, as a matter of statutory interpretation, that as a matter of law the killing of the victim could not be an aggravating factor.

We do not agree with defendant that the record shows that the jury considered the evidence as proof of multiple aggravating factors. The instruction given by the court states clearly that a finding that the murder was committed while defendant was committing another felony could be an aggravating factor, and we find no impropriety in the sentencing procedure.

We consider next defendant's contention that he was denied a fair sentencing hearing because the jury was permitted to consider improper nonstatutory aggravating factors, including unproved charges of previous prison escapes, repeated reference to his recent parole for an offense committed in a manner similar to the present one, testimony that an FBI "rap sheet" existed, and evidence of juvenile adjudications where evidence of nonstatutory aggravating factors was introduced during the sentencing hearing.

[15] This argument is without merit. A defendant is not prejudiced where, at a unitary sentencing hearing, the jury hears as evidence of nonstatutory aggravating factors a summary of defendant's past criminal conduct. (*People v. Brisbon* (1985), 106 Ill.2d 342, 365, 88 Ill.Dec. 87,

the death penalty and based upon the additional factors which are presented to you, in this long and extensive criminal history, certainly warrant if you so choose, a verdict which will sentence him to death."

He concluded that if the jurors "determine that the defendant is eligible [for the death penalty], * * * then you have to consider other factors in making this very big decision, and these are the factors." The evidence of defendant's extensive criminal history and violent lifestyle was, of course, properly considered, and we find no error which could result in prejudice to the defendant.

[18] We find without merit defendant's argument that the assistant State's Attorney improperly argued that the jury could not consider compassion or mercy for defendant. We agree with the People that defendant reads the prosecutor's argument out of context; when the State's Attorney told the jurors to disregard "sympathy and compassion for this person," he was arguing that they should not feel sympathy for defendant merely because he had chosen to defend himself, and because the jurors might be "irritable at some of the things" defendant or the People had done during trial. We conclude that the prosecutor's argument was not an attempt to misinform the jurors that they could not consider compassion as a mitigating factor.

[19] We also disagree with defendant that the prosecutor improperly argued that only the imposition of a sentence of death would be consistent with dignity and their personal commitment to the law, and that which is consistent with the dignity of the proper administration of the criminal justice system. We fail to find, as defendant urges, that such argument improperly incites the jury's passions, fears and emotions with the prosecutor's personal beliefs concerning the desirability of the death penalty. (*People v. Holman* (1984), 103 Ill.2d 133, 170, 82 Ill.Dec. 585, 469 N.E.2d 119.) In *Holman*, the prosecutor improperly argued that the jury must impose the death sentence rather than imprisonment in order to preclude defendant from killing prison guards or other innocent victims should he escape from prison. (103 Ill.2d 133, 162, 82 Ill.Dec. 585, 469 N.E.2d 119.) We distinguished prosecutorial argument which generally explains the deterrence rationale behind the death penalty from prejudicial remarks directed at the particular defendant, and concluded only the latter type of argument was improper. (103 Ill.2d 133, 162, 82 Ill.Dec. 585, 469 N.E.2d 119.) The prosecutor's argument here was a permissible explanation of the deterrence rationale behind the death penalty, and was not so highly prejudicial as to require a new sentencing hearing.

Defendant next argues that the State's Attorney minimized the jury's function by suggesting that its decision was merely a "recommendation," and not a final judgment as to defendant's sentence. Defendant relies on *Caldwell v. Mississippi* (1985), 472 U.S. 320, 330, 105 S.Ct. 2633, 2640, 86 L.Ed.2d 231, 240. We find *Caldwell* to be inapposite. The prosecutor there argued that the jurors should not view themselves as the final arbiters of whether the defendant would die, because their sentence of death would be reviewed for correctness by the Mississippi Supreme Court. The Supreme Court found this argument to be reversible error because it took away from the jury the seriousness with which it should treat its power to determine the appropriateness of the death penalty. (472 U.S. 320, 330, 105 S.Ct. 2633, 2640, 86 L.Ed.2d 231, 240.) We find no such comment to have been made by the State's Attorney here, nor do we find his remarks to be "state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." (472 U.S. 320, 330, 105 S.Ct. 2633, 2640, 86 L.Ed.2d 231, 240.) Rather, the prosecutor did admonish the jury that it had "to decide what is the proper penalty that needs to be imposed." His further admonishments support this remark and in no way tend to shift the jury's responsibility as the sentencing authority.

[20] Defendant next contends that the circuit court's instruction at the sentencing hearing that the jury should not consider

tion 9–1(b) *et seq.* of the Criminal Code of 1961 from those persons convicted of murder and eligible for sentencing under the provision of chapter V of the Unified Code of Corrections (Ill.Rev.Stat.1981, ch. 38, par. 1005–1–1 *et seq.*). We do not agree. This argument fails to take into account the unique sentencing procedure afforded those defendants found eligible for the death penalty, the provision for a two-step sentencing process, and the consideration during the second phase of factors introduced as evidence in mitigation and aggravation. This procedure enables the sentencer to independently weigh these factors and, upon determining whether the mitigating factors outweigh the aggravating factors, decide if the death penalty will be imposed. This procedure enables the sentencer to weigh the individual characteristics of the offender an l determine his character. (*Lockett v. Ohio* (1978), 438 U.S. 586, 605–06, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973, 990.) Those defendants sentenced under the Unified Code of Corrections are not eligible for this special sentencing treatment. Therefore, because the two-stage sentencing determination does distinguish those persons eligible for death from those persons found guilty of murder, defendant's argument must fail.

For the reasons stated, that portion of the judgment based on the felony counts is vacated, and otherwise the judgment of the circuit court of Will County is affirmed. The clerk of this court is directed to enter an order setting Wednesday, May 13, 1987, as the date on which the sentence of death entered in the circuit court of Will County is to be implemented. The defendant shall be executed by lethal injection in the manner provided by section 119—5 of the Code of Criminal Procedure of 1963 (Ill.Rev.Stat. 1983, ch. 38, par. 119—5). A certified copy of the mandate of this court shall be transmitted by the clerk of this court to the Director of Corrections, to the warden of Stateville Correctional Center, and to the warden of the institution wherein defendant is confined.

Affirmed in part and vacated in part.

Justice SIMON, dissenting:

The majority holds that the rule fashioned in *People v. Zehr* (1984), 103 Ill.2d 472, 83 Ill.Dec. 128, 469 N.E.2d 1062, requiring trial judges to probe potential juror biases, including biases against the presumption of innocence, does not apply to this case because the *voir dire* here occurred before this court's opinion in *Zehr* was filed. To reach this result, the court invokes *People v. Britz* (1986), 112 Ill.2d 314, 97 Ill.Dec. 768, 493 N.E.2d 575, which contained language suggesting that the *Zehr* rule would not be retroactive. In my view, *Britz* was fundamentally misguided when it was rendered, and subsequent developments in the law of retroactivity have fully illuminated the error this court fell into when it gave *Zehr* only prospective application.

The court's language in *Britz* concerning the retroactivity of the *Zehr* rule constituted no more than an advisory opinion; as the court recognized there, Britz himself would receive the benefit of the *Zehr* rule since we reversed his conviction on other grounds and remanded for a new trial. Indeed, the discussion of retroactivity in *Britz* was doubly unnecessary because the *voir dire* of which he complained occurred after the appellate court opinion in *People v. Zehr* (1982), 110 Ill.App.3d 458, 66 Ill. Dec. 155, 442 N.E.2d 581. The appellate court in *Zehr* had ruled, as we later agreed, that the trial judge should have questioned jurors as to their biases against the defendant's constitutional guarantees. *Britz* undercut the authority of the appellate court by failing to give prospective effect to the appellate court's opinion in *Zehr*.

The court commits the same error here. The defendant in this case was tried long after the appellate court had spoken in *Zehr*; in fact, the appellate court's opinion was handed down by a panel in the third district, the same district in which the trial court here sat. If the majority here is right, we should abandon what I understand is our accepted rule that trial judges are bound by the decisions of the appellate court.

earlier assertion that the two-step process is not an indispensable aspect of the system. If the two-step procedure is critical to the constitutionality of the statute, how can it logically be explained that the majority can find no error in the unitary proceeding conducted here?

Finally, for the reasons set forth in my separate opinions in *People v. Lewis* (1981), 88 Ill.2d 129, 179, 58 Ill.Dec. 895, 430 N.E.2d 1346 (Simon, J., dissenting), in *People v. Silagy* (1984), 101 Ill.2d 147, 184, 77 Ill.Dec. 792, 461 N.E.2d 415 (Simon, J., concurring in part and dissenting in part), and in *People v. Albanese* (1984), 104 Ill.2d 504, 549, 85 Ill.Dec. 441, 473 N.E.2d 1246 (Simon, J., concurring in part and dissenting in part), I believe that the Illinois death penalty statute is unconstitutional and that the death sentence in this case should be vacated. See also *United States ex rel. Lewis v. Lane* (C.D.Ill.1987), 656 F.Supp. 181, 195 (expressing "grave doubts" over the constitutionality of the Illinois death penalty statute).

KEY NUMBER SYSTEM

APPENDIX C

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August 6, 1987

State Appellate Defender
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Chicago, IL 60601

ATTN: Charles Hoffman

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 59908 - People State of Illinois, appellee, v. Donald R. Lego, appellant.

The motion by appellant to vacate this court's order of June 5, 1987, denying rehearing and to retain jurisdiction of this cause is allowed.

JH:sdl

cc: AG/Crim
SA/Will
SAD/SCU (Charles M. Schiedel)
Donald R. Lego

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DONALD R. LEGO, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

NOTICE AND PROOF OF SERVICE

TO: Honorable Joseph F. Spaniol, Jr., Clerk of the Supreme Court of the United States, 1 First Street N.E. Washington, D.C. 20543; Mr. Edward Masters, State's Attorney, 14 W. Jefferson Street Joliet, Illinois 60431; Neil F. Hartigan, Attorney General 100 W. Randolph, 12th Floor, Chicago, Illinois 60601; Donald R. Lego, Register No. 40953, Menard Correctional Center, P.O. Box 711, Menard, Illinois 62259

Please take notice that I have mailed the original and nine copies of the Petition for Writ of Certiorari to the Clerk of the above court and that I am serving the Attorney General and the State's Attorney each with three copies and I am serving the petitioner with one copy by depositing the copies in the mail in Chicago, Illinois, with sufficient prepaid postage and addressed as indicated above on this 16th day of August, 1988. All parties required to have been served have been served.

CHARLES HOFFMAN
Assistant Appellate Defender

SUBSCRIBED AND SWORN TO BEFORE ME
this 16th day of August, 1988.

JEWELLINE HOUSTON
Notary Public, State of Illinois
My Commission Expires

NOTARY PUBLIC

Supreme Court, U.S.
FILED
SEP 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-5319

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

DONALD R. LEGO,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Has petitioner preserved his argument for certiorari review?

2. Is the Illinois Supreme Court's decision in Zehr a state law rule or a constitutionally based rule to which the Griffith principles apply?

3. Even if Zehr is constitutionally based and entitled to retroactive application, was there any Zehr violation to correct on the facts of this case?

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No. 88-5319

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

DONALD R. LEGO,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

Respondent asks this Court to deny the petition for writ of certiorari to review the judgment of the Illinois Supreme Court.

OPINION BELOW

A copy of the opinion of the Illinois Supreme Court, cited as People v. Lego, 116 Ill.2d 323, 507 N.E.2d 800 (1987), was appended to the petition for writ of certiorari.

STATUTORY PROVISION INVOLVED

Illinois Supreme Court Rule 234, Ill. Rev. Stat. ch. 110A, sec. 234, 87 Ill. 2d R. 234 (1983) provides:

> Voir Dire Examination of Jurors
>
> The court shall conduct the voir dire examination of prospective jurors by putting to them questions it thinks appropriate touching their qualifications to serve as jurors in the case on trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks that are appropriate, or may permit the parties to supplement the examination by such direct ry as the court deems proper. Questi ill not directly or indirectly concer ers of law or instructions.

STATEMENT OF FACTS

In 1982, an intermediate Illinois appellate court held in People v. Zehr, 110 Ill.App.3d 458, 442 N.E.2d 581 (3rd Dist. 1984) that voir dire examination should include questions as to the understanding of the presumption of innocence.

In Lego's case, voir dire was conducted by the trial judge in March, 1984. Lego proposed that the judge ask each venireman "do you believe in the presumption of innocence as it applies to a person charged with a crime?" (R. 1094-1095). The judge declined to ask the question exactly as proposed and instead told the veniremen about the presumption of innocence and how it worked, (R. 1129-1131), and asked: do you have any bias or prejudice against a person simply because he is charged with a crime? (R. 1098, 1235, 1296); will you apply the law as the court states it to be, regardless of your personal feelings about it? (R. 1237, 1298); and if you are accepted as a juror, will you be fair and impartial? (R. 1237, 1298).

Lego was convicted and, while his direct appeal pended, the Illinois Supreme Court affirmed the appellate court decision in Zehr in September, 1984. People v. Zehr, 103 Ill.2d 472, 469 N.Ed.2d 1062 (1984). Then two years later, in People v. Britz, 112 Ill. 2d 314, 493 N.E.2d 575 (1986), the court declined to give Zehr retroactive application since it represented a change in Illinois law. Thereafter, this Court rendered its decision in Griffith v. Kentucky, 479 U.S. __ , 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), providing that new constitutional principles should be applied to cases pending on direct review.

On direct appeal, Lego claimed the trial court's refusal to ask his voir dire question as tendered was reversible error and an abuse of discretion. He based his claim on the Illinois Supreme Court's decision in Zehr.

In June 1987, the Court held that voir dire was conducted properly under the state rule which governed voir dire, Illinois Supreme Court Rule 234. Zehr was inapplicable because it was decided after Lego's trial and, as the Court held in

Britz, it had only prospective application where it "represented a change in Illinois law." Lego, 507 N.E.2d at 805. One justice dissented, stating that the court should have applied Zehr retroactively for the reasons set out in Griffith.

Lego picked up on the dissent position and, for the first time, argued that Griffith required the court to apply Zehr retroactively. Also for the first time, he claimed that the question he had tendered on the presumption of innocence had a constitutional basis in the right to the presumption of innocence as contemplated in In Re Winship, 397 U.S. 358 (1970) and the right to a fair and impartial jury as contemplated in Turner v. Louisianna, 379 U.S. 466 (1965).

Rehearing was denied June 5, 1987. But the court vacated its denial August 6, 1987, in light of an issue pending in other cases which could affect Lego's case, namely: whether the appellate court opinion in Zehr was controlling authority for trials within that district held after issuance of that opinion but before issuance of the Illinois Supreme Court's opinion.

After the court resolved that the appellate court's opinion was not controlling in such cases, it denied rehearing in this cause on June 27, 1988.

REASONS FOR DENYING THE WRIT

Because the Illinois Supreme Court has declined to give Zehr retroactivity, Lego now seeks to bring the Illinois retroactivity doctrine into conformity with Griffith v. Kentucky, 479 U.S.__, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). In Griffith, this Court removed the "clear break" exception for retroactivity for cases pending on direct appeal at the time a new constitutional rule is announced.

Lego's attempt to obtain this Court's review fails for three reasons: 1) he has not preserved the Griffith issue for certiorari review, 2) he does not present a substantial federal question since Griffith principles apply only to constitutional rules, not state court rules, and 3) he does not present an issue worthy of review since, even if Griffith applies, there was no Zehr violation on the facts of this case.

I. PETITIONER HAS NOT PRESERVED HIS ARGUMENT FOR CERTIORARI REVIEW.

Before the Illinois Supreme Court, Lego did not frame his claim as one of federal constitutional law. He did not claim that the jurors ultimately seated at his trial were impartial within the meaning of the fifth amendment, did not claim that he was prevented from exercising peremptory challenges, and did not claim a sixth or fourteenth amendment violation. Lego did not cite federal precedents to frame his argument and/or any cases employing a constitutional analysis. As a result, Lego's case was decided on state law grounds alone. Because there is an independent and adequate state law ground in this case, this Court should decline 28 U.S.C. § 1257 review. New York Transit Authority v. Beazer, 440 U.S. 568 (1979); Reserve Army v. Municipal Court, 331 U.S. 549 (1947).

Equally important, Lego merely alleged it was reversible trial court error to refuse the proposed voir dire questions. He did not make a timely Griffith claim in state court. Because petitioner did not seasonably advance his Griffith challenge in the state courts, certiorari review is

inappropriate. Cardinale v. Louisiana, 394 U.S. 437 (1969); Beck v. Washington, 369 U.S. 541, 552-53 (1962).

II. THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION BECAUSE ZEHR IS NOT A CONSTITUTIONALLY BASED RULE TO WHICH THE GRIFFITH PRINCIPLES APPLY.

Certiorari review is also inappropriate because no substantial federal question is presented in this case. In the Zehr decisions, the Illinois courts decided as a matter of state law that a trial judge commits an abuse of discretion if he refuses tendered voir dire questions on these topics. The Illinois courts did not purport or attempt to resolve a question of federal constitutional law. Thus, in Britz, the Court explicitly stated that "the holding in Zehr represented a change in Illinois law." People v. Britz, 112 Ill.2d 314, 319, 498 N.E.2d 575 (1986) (emphasis added); See also People v. Wilson, 98 Ill. Dec. 65, 493 N.E.2d 1086 (1986) and People v. Boswell, 94 Ill. Dec. 447, 488 N.E.2d 273 (1986) (where Illinois Supreme Court, in exercise of supervisory authority, reversed appellate courts which had given retroactive effect to Zehr).

There is no constitutional right to a peremptory challenge. Stilson v. United States, 250 U.S. 583, 586 (1919). Nor is there a constitutionally prescribed formula for voir dire examination. Compare Batson v. Kentucky, 476 U.S. 79 (1986) (racially discriminatory jury selection may deny equal protection of the law) and Turner v. Murray, 476 U.S. 28, 106 S. Ct. 1683, 1688 and n.10 (1986) (although sixth amendment violated in special circumstances involving a capital sentencing proceeding and an interracial murder, the Court declined to order trial judges to inquire regarding racial prejudice in every case).

In general, the sovereign states remain free to promulgate their own rules of criminal trial procedure. Illinois Supreme Court Rule 234 represents a valid manifestation of this exercise of state power. Cf. Spaziano v. Florida, 463 U.S.

447, 464 (1984) (there is no one right way to formulate a capital sentencing scheme). It permits the trial court judge, in the exercise of his discretion, to ask supplemental voir dire questions tendered by the parties. These questions "shall not directly or indirectly concern matters of law or instructions." Under this rule, the Illinois courts traditionally refuse supplemental questions of the very type proposed by Lego in this case. See People v. Lobb, 17 Ill. 2d 287, 161 N.E.2d 325 (1959); People v. Davis, 95 Ill. 2d 1, 447 N.E.2d 353, cert. denied, 464 U.S. 1001 (1983); Ill. Rev. Stat. ch. 110A, sec. 234 (Smith-Hurd 1983) Historical and Practice Note.

In a similar manner, the states may formulate their own substantive law of retroactivity. There is no federal constitutional right to retroactivity of a particular decision. Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 364 (1932); Linkletter v. Walker, 381 U.S. 618, 629-29 (1965); Griffith, 107 S. Ct. at 712. Thus, the Illinois court has chosen to follow principles explained in Stovall v. Denno, 388 U.S. 293 (1967) when asked to confer retroactivity for a new state procedural rule. For example, in People v. Erickson, 117 Ill. 2d 271, 513 N.E.2d 367 (1986), the Illinois court applied the Stovall test to deny retroactivity for a new state law decision concerning pretrial waivers of sentencing juries. It said:

> [b]ecause Griffith addresses a rule which pertains to a constitutional right and the defendant herein seeks retroactive application of a rule which pertains to a statutory right, we do not deem Griffith controlling.

117 Ill. 2d at 280.

In sum, the Illinois Supreme Court was permitted to deny retroactivity to a new decision which modified established jury selection procedure. This Court should not grant certiorari review to formulate a common retroactivity theory for all the state states.

III. REVIEW IS INAPPROPRIATE BECAUSE, EVEN IF ZEHR IS CONSTITUTIONALLY BASED AND ENTITLED TO RETROACTIVE APPLICATION, THERE WAS NO ZEHR VIOLATION ON THE FACTS OF THIS CASE.

Finally, even if Zehr was constitutionally based and entitled to retroactive application, certiorari review is inappropriate because there was no Zehr violation on the facts of this case. The voir dire examination complied with the Zehr principles. It this Court were to intervene, it must still affirm the conviction and sentence.

Zehr said that the questions on the presumption of innocence "need not [be] asked in precisely the form submitted" so long as "the subject matter of questions [is] covered in the course of interrogation of voir dire." Zehr, 469 N.E.2d at 1064. The subject matter was convered in Lego's case when the judge told the venire pool that:

> under the law this defendant is presumed to be innocent of the charges against him, and that the presumption of innocence remains with him throughout the case, and during your deliberations on the verdict, until you have been convinced by the evidence in the case beyond a reasonable doubt of the guilt of the Defendant.
>
> Throughout the case, the burden of proving the guilt of the Defendant beyond a reasonable doubt is on the State. The law does not require that the Defendant prove his innocence.
>
> Your duties as jurors are to answer truthfully any questions which I put to you touching upon your qualifications to serve as jurors, and to state any matter which would tend to disqualify you as jurors.
>
> * * *
>
> It is your responsibility. You have an absolute duty as jurors to accept the law as the court states the law to be.
>
> * * *
>
> If you can't follow the law on the presumption of innocence or if you can't follow the law on the burden of proof, if you have personal objections to the law, then you can't serve as jurors.

(R. 1129-1130, 1131).

In addition, the judge asked each individual venireman the following questions: whether or not they have any bias or prejudice against a person simply because he is charged with a crime? (R. 1098, 1235, 1296); will you apply the law as the

court states it to be, regardless of your personal feelings about it? (R. 1237, 1298); and if you are accepted as a juror, will you be fair and impartial? (R. 1237, 1298).

This record demonstrates that: each juror knew about the presumption of innocence, each juror knew that he could serve if he had any objection to this presumption, each juror told the court he had no problem with any of these basic guarantees, and each juror assured the court that he had no bias against Lego simply because he was charged with the crime of murder. In this way, the voir dire successfully fulfilled Zehr's demand to get to the heart of any particular bias or prejudice which would deprive a defendant of his right to a fair and impartial jury.

This Court should not grant certiorari to establish a principle of retroactivity that will make no difference to the result of this case.

CONCLUSION

WHEREFORE, the People of the State of Illinois ask this Court to deny the petition for writ of certiorari.

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No. 88-5319

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DONALD R. LEGO, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

PETITIONER'S REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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No. 88-5319

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DONALD R. LEGO, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

I. PETITIONER TIMELY RAISED HIS CLAIM IN STATE COURT.

The respondent State of Illinois first argues that certiorari should be denied because Petitioner did not make a timely Griffith v. Kentucky retroactivity claim in state court. This contention is not true.

The instant case was briefed in the Illinois Supreme Court well before this Court's decision in Griffith v. Kentucky. In those briefs, the parties argued the question of the retroactive application of People v. Zehr, 103 Ill.2d 472, 469 N.E.2d 1062 (1984) under the "clear break" exception to retroactivity, which was the law prior to Griffith. See Brief and Argument for Plaintiff-Appellee, State of Illinois, p. 25 (filed September 13, 1985)(attached hereto as Appendix A); Reply brief for Defendant-Appellant Donald Lego, p. 5-6 (Filed September 27, 1985)(attached as Appendix B).

After oral argument in the Illinois Supreme Court, while the instant case was under advisement by that court, this Court, on January 13, 1987, decided Griffith v. Kentucky, 479 U.S. __, 93 L.Ed.2d 649 (1987), which abolished the clear break exception to retroactivity for cases pending on direct review. Five weeks after this Court decided Griffith, the Illinois Supreme Court issued its opinion in Petitioner's case. People v. Lego, 116 Ill.2d 323, 507 N.E.2d 800 (1987). The majority held, without mentioning Griffith, that Zehr would not be applied retroactivity since it represented a change in the law. People v. Lego, 507

N.E.2d at 805. In dissent, Justice Simon argued that Griffith required that Zehr be applied retroactivity to Petitioner's case. 507 N.E.2d at 813. Petitioner then filed a Petition for Rehearing in the Illinois Supreme Court which, relying on Griffith, urged that court to reconsider its refusal to apply Zehr retroactively. See Petition for Rehearing for Defendant-Appellant, p. 6-8 (filed April 13, 1987)(attached as Appendix C).

The Petitioner raised his claim under Griffith v. Kentucky in his Petition for Rehearing before the Illinois Supreme Court, which was the first opportunity he had in which to do so. For purposes of seeking a writ of certiorari, Petitioner's Griffith claim was timely made in state court. Beck v. Washington, 369 U.S. 541, 553 (1982); Brinkerhoff-Faris Trust and Savings Company v. Hill, 281 U.S. 673, 677-8 (1930).

II. THIS CASE PRESENTS A SUBSTANTIAL FEDERAL QUESTION BECAUSE THE DECISION OF THE ILLINOIS SUPREME COURT IN PEOPLE v. ZEHR IS GROUNDED IN FUNDAMENTAL CONSTITUTIONAL GUARANTEES.

The Respondent argues that certiorari review is inappropriate because the underlying substantive issue in People v. Zehr, 103 Ill.2d 472, 469 N.E.2d 1062 (1984), which Petitioner seeks to have applied retroactivity to his case, is based on state law. In Zehr, the Illinois Supreme Court held that it was error for the trial court to refuse to voir dire prospective jurors on 1) whether the jurors understood the presumption of innocence; 2) whether they understood the defendant need not present evidence; and 3) whether they could return a verdict of not guilty if the prosecution failed to prove defendant guilty beyond a reasonable doubt.

It is clear from the language of the Zehr opinion itself that it is not based merely on state law. Rather, it is grounded in the defendant's constitutional guarantee to the presumption of innocence [In Re Winship, 397 U.S. 358 (1970)] and to a fair and impartial jury [Turner v. Louisiana, 379 U.S. 466 (1985); Chapman v. California, 386 U.S. 18 (1967)]. In Zehr, the Illinois

Supreme Court stated:

> We are of the opinion that essential to the qualification of jurors in a criminal case is that they know that a defendant is presumed innocent, that he is not required to offer any evidence in his own behalf, that he must be proved guilty beyond a reasonable doubt, and that his failure to testify in his own behalf cannot be held against him. If a juror has a prejudice against any of these basic guarantees, an instruction given at the end of the trial will have little curative effect. It is also vital to the selection of a fair and impartial jury that a juror who finds that the State has failed to sustain its burden of proof of guilt beyond a reasonable doubt have no prejudices against returning a verdict of not guilty. We note parenthetically that it is equally important that a juror who finds that the State has sustained its burden of proof have no prejudice against returning a verdict of guilty. We agree with the appellate court that "[e]ach of these questions goes to the heart of a particular bias or prejudice which would deprive defendant of his right to a fair and impartial jury" (110 Ill.App.3d 458, 461, 66 Ill.Dec. 155, 442 N.E.2d 581), and although they need not have been asked in precisely the form submitted, the subject matter of the questions should have been covered in the course of interrogation on voir dire. The refusal to ask the questions resulted in prejudicial error which required reversal of the judgment.

469 N.E.2d at 1064 (emphasis added).

Moreover, as subsequent cases make clear, the Illinois Supreme Court has refused to give Zehr retroactive application not because it is based on state law, and therefore not subject to Griffith, but because Griffith had not yet been decided when, in People v. Britz, 112 Ill.2d 314, 493 N.E.2d 575 (1986), the court held Zehr to apply prospectively only under the then-prevailing "clear break" exception to retroactivity. For example, in People v. Harris, 123 Ill.2d 113 (1988), the Illinois Supreme Court extensively discussed this interpretation of the applicability of Griffith stating:

> Defendants further argue, in the alternative, that the prospective application rule of our Zehr holding announced in Britz should be reconsidered in light of Griffith v. Kentucky (1987), 479 U.S. 314, 93 L.Ed.2d 649, 107 S.Ct. 708. We find no merit to the defendants' argument because at the time Britz was decided this court correctly followed the applicable law on retroactivity as articulated by the United States Supreme Court in a series of cases beginning with Linkletter v. Walker (1965), 381 U.S. 618, 14 L.Ed2d 601, 85 S.Ct. 1731. (citations omitted) Prior to Griffith, it was clear

> that "where the Court had expressly declared a rule of criminal procedure to be a 'clear break with the past', Desist v. United States, 394 U.S. at 248, it almost invariably has gone on to find such a newly minted principle nonretroactive." (United State v. Johnson (1982), 457 U.S. 537, 549, 73 L.Ed.2d 202, 213, 102 S.Ct. 2579, 2587.) In the instant case, because Zehr had overturned a longstanding practice to which this court had not spoken, but which a nearly unanimous body of lower court authority had approved. (see People v. Phillip (1st Dist. 1981) 99 Ill.App.3d 362; People v. Lowe, (5th Dist. 1975), 30 Ill.App.3d 49; People v. Stewart, (4th Dist. 1973), 12 Ill.App.3d 226), it represented a "clear break" with the past. (See United States v. Peltier (1975), 422 U.S. 531, 45 L.Ed.2d 374, 95 S.Ct 2313; Stovall v. Denno (1967), 388 U.S. 293, 18 L.Ed.2d 1199, 87 S.Ct. 1967.) Although Griffith subsequently overturned the "clear break" exception, Griffith was not the law on retroactivity at the time this court decided Britz. We do not read Griffith as requiring us to reconsider our earlier holding in Britz.

123 Ill.2d at 129-30.

The reasoning of the Illinois Supreme Court is, however, based on a misunderstanding of Griffith. The rule announced in Griffith applies to all cases pending on direct review at the time it was decided. Petitioner's case was pending on direct review at that time. Therefore, the retroactivity principle of Griffith applies to Petitioner's case. It is irrelevant that the Illinois Supreme Court had applied a different retroactivity analysis to the substantive Zehr issue involved before Griffith was decided.

Because the Illinois Supreme Court refused to give retroactive effect to a constitutional holding (Zehr), in a case pending on direct review at the time Griffith was decided, certiorari should be granted.

III. CERTIORARI SHOULD BE GRANTED REGARDLESS OF WHETHER A ZEHR VIOLATION OCCURRED IN THIS CASE.

Lastly, the Respondent argues that certiorari should not be granted because no Zehr violation occurred on the facts of this case. This consideration, however, is irrelevant to whether certiorari should be granted.

The Illinois Supreme Court refused to reach the merits of

the Zehr issue based on its determination that Zehr was not retroactive. That determination was in conflict with Griffith v. Kentucky. This Court should grant certiorari, vacate the judgment of the Illinois Supreme Court, and hold that a state court which renders a decision establishing a new federal constitutional rule is bound to apply this Court's retroactivity standards in determining the scope of retroactivity of that new rule. The case should then be remanded to the Illinois Supreme Court for reconsideration of the Zehr issue in light of Griffith. That is the appropriate, and necessary, relief to which Petitioner is entitled.

CONCLUSION

For the foregoing reasons, Donald R. Lego, Petitioner, respectfully asks that a writ of certiorari be issued to the Supreme Court of Illinois.

Respectfully submitted,

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APPENDIX A

NO. 59908

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DONALD LEGO, Defendant-Appellant.	))))))))	Direct appeal from the Circuit Court of Illinois, 12th Judicial Circuit, No. 83-CF-520 The Honorable Michael A. Orenic, Judge Presiding.

BRIEF AND ARGUMENT FOR PLAINTIFF-APPELLEE

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ORAL ARGUMENT REQUESTED

the precise form submitted by Lego, the subject matter of Lego's question was covered during the course of voir dire interrogation.

If this court does find that a Zehr violation occurred at bar, the People ask that this court hold that Zehr does not apply retroactively. It has been the policy of this court to give only prospective application to a decision which reverses the prevailing precedent. Alvis v. Ribar, 85 Ill.2d 1, 421 N.E.2d 886 (1981); Wilson v. Clark, 84 Ill.2d 186, 417 N.E.2d 1322 (1981); People v. Viser, 62 Ill.2d 568, 343 N.E.2d 903 (1975); People v. Rossi, 52 Ill.2d 13, 284 N.E.2d 275 (1972).

Before Zehr, questions regarding the basic guarantees were explained by the court at voir dire in the manner conducted by Judge Orenic at bar; individual questioning regarding each guarantee was considered inappropriate under Supreme Court Rule 234 as improper questioning on matters of law and instruction. People v. Lobb, 177 Ill.2d 287, 161 N.E.2d 325 (1959); Ill. Rev. Stat., ch. 110A, par. 234 (Smith-Hurd, 1968), Historical and Practice Note, pp. 258-260. Jurors were only to be asked whether or not they are willing and able to accept and follow the instructions concerning the law of the case. Lobb, 17 Ill.2d at 302.

Voir dire at bar occurred in March of 1984 and Zehr came down in September of 1984. Therefore, it should not be applied to this case.

APPENDIX B

NO. 59908

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
vs.	)	No. 83-CF-520
DONALD R. LEGO,	)	Honorable Michael A. Orenic, Judge Presiding.
Defendant-Appellant.	)	

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

The State alternatively argues that in the event of a Zehr violation, that decision should be applied retroactively because it is "a decision which reverses the prevailing precedent." (State's Br. 25) However, even a cursory reading of Zehr establishes that that decision has nothing to do with reversing existing precedent. Cf. Alvis v. Ribar, 85 Ill.2d 1, 421 N.E.2d 886 (1981) (where this Court changed the structure of negligence theory in Illinois, reversing the prevailing contributory negligence standard and replacing it with comparative negligence).

Finally, although the State also alternatively argues that the recent decision in Zehr should be overruled, no sound reason is given for such a result. The proposition is therefore meritless.

> these basic guarantees, an instruction given at the end of trial will have little curative effect. It is also vital to the selection of a fair and impartial jury that a juror who finds that the State has failed to sustain its burden of proof of guilt beyond a reasonable doubt have no prejudice against returning a verdict of not guilty.
>
> 469 N.E.2d at 1064.

Accordingly, since Zehr involves a rule of "constitutional dimension", it must be applied retroactively to all cases pending on direct appeal under this Court's recent decision in Erickson. Erickson applied for the first time the decision of the United States Supreme Court in Griffith v. Kentucky, 479 U.S. ___, 107 S.Ct. 708, 93 L.Ed.2d 649, 661 (1987). Erickson held that under Griffith a judicial opinion is retroactive to all cases pending on direct review at the time the opinion is announced where (1) the opinion declares a new constitutional rule, or (2) the opinion declares "a newly announced rule of criminal procedure which implicates the fundamental fairness or the truth-seeking effectiveness of a defendant's trial on the issue of guilt or innocence." Erickson, slip op. at 10.

As these principles are applied to the present case, this Court's decision in Zehr at the very least and by definition satisfies the second prong of Erickson. Zehr is predicated on the qualification of jurors who may be so biased or prejudiced against defendant's constitutional guarantees that they would return a verdict of guilty despite the sufficiency of the evidence. One would be hard-pressed to find a more fundamental proposition implicating the fundamental fairness of a criminal trial. Therefore, Zehr should have been applied retroactively to

APPENDIX C

NO. 59908

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the Twelfth Judicial Circuit of Will County, Illinois.
Plaintiff-Respondent,	)	
vs.	)	No. 83-CF-520
DONALD R. LEGO,	)	Honorable Michael A. Orenic, Judge Presiding.
Defendant-Petitioner.	)	

PETITION FOR REHEARING

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III.

BECAUSE THIS COURT RECENTLY HELD IN PEOPLE V. ERICKSON, NO. 59058 (4/2/87), THAT NEW RULES OF CONSTITUTIONAL DIMENSION MUST BE APPLIED RETROACTIVELY TO CASES ON DIRECT APPEAL, AND BECAUSE THIS COURT'S DECISION IN PEOPLE V. ZEHR, 103 Ill.2d 472 (1984) CLEARLY IMPLICATES SUCH CONSTITUTIONAL GUARANTEES AS THE RIGHT TO A FAIR AND IMPARTIAL JURY AND THE RIGHT TO THE PRESUMPTION OF INNOCENCE, REHEARING ON ARGUMENT III IS ESSENTIAL.

Because of this Court's recent decision in People v. Erickson, No. 59058, (4/2/87) (Appendix C), this Court should grant rehearing to reconsider its refusal to apply retroactively People v. Zehr, 103 Ill.2d 472, 469 N.E.2d 1062 (1984). People v. Lego, No. 59908, slip op. 5 (4/2/87). Zehr clearly implicates issues of constitutional dimension because it was predicated on two wholly interrelated constitutional concepts:

1. the defendant's constitutional guarantee to the presumption of innocence in a criminal case (In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), and

2. the defendant's constitutional guarantee to a fair and impartial jury (Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424, 428-429 (1965); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, 708-710 (1967).

There is no question that Zehr applied these constitutional guarantees, where this Court held there:

> We are of the opinion that essential to the qualification of jurors in a criminal case is that they know that a defendant is presumed innocent...If a juror has a prejudice against

defendant's case and should have required that he receive a new and fair trial.

It is self-evident from the above discussion that this Court should re-evaluate its retroactivity analysis of People v. Zehr, 103 Ill.2d 472, 469 N.E.2d 1062 (1984) (as applied in People v. Britz, 112 Ill.2d 314, 493 N.E.2d 575 (1986)). This Court should therefore grant rehearing on Argument III and order that defendant receive a new trial, or, in the alternative, order full briefing on this essential point.

SUPREME COURT OF THE UNITED STATES

DONALD R. LEGO *v.* ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 88-5319. Decided October 11, 1988

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case. Even if I did not take this view, I would grant the petition in order to resolve the question whether a state court, when recognizing a new federal constitutional rule of criminal procedure, is bound by the retroactivity principles fashioned by this Court, and if so, whether the principle of retroactivity announced in *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), applies to a state court decision recognizing such a rule, notwithstanding the state court's pre-*Griffith* determination that, under the retroactivity decisions of this Court then in force, the new rule would be given prospective application only.

II

In March 1984, the petitioner was tried in state court for murder. During voir dire, the petitioner proposed that the trial court ask the venirepersons whether they "believe[d] in the presumption of innocence as it applies to a person charged with a crime." The trial court refused. The petitioner was subsequently convicted and, after a death penalty

hearing, sentenced to death. In his direct appeal to the Illinois Supreme Court, the petitioner argued that the trial court's refusal to ask the proposed question violated *People* v. *Zehr*, 103 Ill. 2d 472, 469 N. E. 2d 1062 (1984), which issued approximately six months after the petitioner's trial concluded. *Zehr* held that a criminal defendant is deprived of his right to "a fair and impartial jury" by a trial court's refusal to question prospective jurors on their view on the presumption of innocence. *Id.*, at 477, 469 N. E. 2d, at 1064.

The Illinois Supreme Court rejected the petitioner's claim, noting that in *People* v. *Britz*, 112 Ill. 2d 314, 493 N. E. 2d 575 (1986), it had held that *Zehr* would not be applied retroactively because it "represented a change in Illinois law." *People* v. *Lego*, 116 Ill. 2d 323, 338, 507 N. E. 2d 800, 805 (1987) (quoting *Britz*, 112 Ill. 2d, at 319, 493 N. E. 2d, at 577). Justice Simon dissented, finding that *Britz* could not be squared with this Court's subsequent decision in *Griffith*. In *Griffith*, the Court held that decisions announcing new constitutional rules of criminal procedure are "to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." 479 U. S., at 328. In so doing, the Court explicitly abandoned the "clear break" exception, under which a new constitutional rule would not be applied retroactively if it represented a substantial departure from past precedent or accepted practice. *Ibid.*

As noted above, the Illinois Supreme Court's *Britz* decision is based on this now-discredited "clear break" exception, but the state court nonetheless insisted on applying it in the petitioner's case for reasons not made clear until *People* v. *Harris*, 123 Ill. 2d 113, 526 N. E. 2d 335 (1988), cert. pending *sub nom. Wilson* v. *Illinois*, No. 88–5315. There, the state court explained: "*Griffith* was *not* the law on retroactivity at the time this court decided *Britz*. We do not read *Griffith* as requiring us to reconsider our earlier holding in *Britz*." *Id.*, at 130, 526 N. E. 2d, at 341 (emphasis in original). In other

words, the state court believes that it need not apply *Griffith*'s retroactivity rule retroactively.

The difficulty with this view, in my judgment, is that it appears to contradict the very premise of the *Griffith* decision, namely that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." 479 U. S., at 322. Not the least, it "creates the . . . problem of not treating similarly situated defendants the same." *Id.*, at 327.

I am unpersuaded by the respondent's contention that the Illinois Supreme Court was free to ignore this Court's retroactivity principles because *Zehr* was a ruling on state, rather than federal, law. This assertion is belied by the fact that, in *Harris*, the state court understood itself to be bound by federal retroactivity precedents. 123 Ill. 2d, at 129, 526 N. E. 2d, at 341 ("[A]t the time *Britz* was decided this court correctly followed the applicable law on retroactivity as articulated by the United States Supreme Court.").* And, as explained in *People* v. *Erickson*, 117 Ill. 2d 271, 513 N. E. 2d 367 (1987), the state court looks to this Court's retroactivity precedents *only* when the rule announced is of federal constitutional dimension. *See id.*, at 289, 513 N. E. 2d, at 374 ("Because *Griffith* addresses a rule which pertains to a constitutional right and the defendant herein seeks retroactive application of a rule which pertains to a statutory right, we do not deem *Griffith* controlling."). It is proper to assume, therefore, that *Zehr* recognizes a federal right.

In any event, this Court typically retains a role when the state court "has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes* v. *Wold Engineering, P. C.*, 467 U. S. 138, 152 (1984). Indeed,

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*Indeed, the only question for the state court in *Harris* was whether the applicable retroactivity precedent for a post-*Griffith* claim based on *Zehr* is *Griffith* itself or a series of cases beginning with *Linkletter* v. *Walker*, 381 U. S. 618 (1965), and culminating with *United States* v. *Johnson*, 457 U. S. 537 (1982).

where it appears, as it does here, that the "state court has proceeded on an incorrect perception of federal law," this Court has stepped in and "reviewed the federal question on which the state-law determination appears to have been premised." *Ibid.* Thus, even if *Zehr* is premised on state law, the Court may consider the retroactivity of that decision because the Illinois Supreme Court looked solely to our precedents in making its retroactivity determination.

Because the instant case and *People* v. *Harris*, 123 Ill. 2d 113, 526 N. E. 2d 335 (1988), cert. pending *sub nom. Wilson* v. *Illinois*, No. 88–5315, raise a substantial issue of federal retroactivity law, I would grant the petitions for certiorari in both cases. I dissent.